**Rapid Armored Corp. *and* United Federation of Security Officers, Inc., Petitioner.** Case 29–RC–8795

May 9, 1997

ORDER DENYING REVIEW

BY CHAIRMAN GOULD AND MEMBERS FOX AND HIGGINS

The National Labor Relations Board has considered the Employer's Request for Review of the Regional Director's Decision and Direction of Election (pertinent portions of which are attached as an appendix).[1] The Request for Review is denied as it raises no substantial issues warranting review.[2]

[1] The sole issue presented by the request for review is whether the Regional Director erred by finding that the Petitioner, which the Employer alleges admits to membership employees other than guards, is a certifiable guard union.

[2] Chairman Gould did not participate in *Wells Fargo Armored Service Corp.*, 270 NLRB 787 (1984), review dismissed; *Truck Drivers Local 807 v. NLRB*, 755 F.2d 5 (2d Cir. 1985), cert. denied 474 U.S. 901 (1985). He expresses no view about the viability of the holding of *Wells Fargo*. The issue is subjudice in *Temple Security, Inc.*, Cases 13–CA–33078, 13–CA–33382.

APPENDIX

DECISION AND DIRECTION OF ELECTION

. . . .

5. During the hearing, the Employer raised an issue concerning the 9(b)(3) status of the United Federation of Security Officers, Inc. (the Petitioner), as it relates to its ability to [be] certified by the Board as the representative of a unit of guards. The parties stipulated that the employees in the petitioned-for unit are guards within the meaning of Section 9(b)(3) of the Act. The Employer argues that the Petitioner represents nonguard employees employed by other employers. In support of its position, the Employer called as a witness Don McDonald, who is employed by Hudson Armored Car (Hudson) a business located in Westchester, New York. The Petitioner contends that it only admits guards to membership, and in its defense, the Petitioner called its president, Ralph Purdy, as a witness.

McDonald has been employed by Hudson for 18 years as a courier. It is undisputed that Hudson and the Petitioner are parties to a collective-bargaining agreement. Inasmuch as the contract was not offered into evidence, the exact language of the recognized unit is unknown. However, McDonald testified that he is covered by the Petitioner's collective-bargaining agreement with Hudson, that he is a member of the Petitioner and pays dues to the Petitioner. Regarding McDonald's specific duties, he testified that he picks up cashed checks from certain banks and delivers them to check processing centers. He also delivers interoffice mail between the banks' branches and delivers supplies to the banks. McDonald does not deliver jewelry, gold bullion, bonds, bank notes, or currency bags. McDonald arrives at the banks after the banks have closed for the day. Thus, he has a key to each bank, he disengages the alarm, picks up the material he is to deliver, locks the door, and reactivates the alarm. In his capacity as a courier, McDonald spends most of his time driving a Ford Escort from location to location. The Ford Escort is not an armored vehicle, it does not have special locking devices, nor does it have a vault, as do other armored vehicles. However, during the first hour of his workday, McDonald drives an armored minivan to Connecticut, where he picks up some mail and returns that mail to the Hudson facility.[2] In performing his remaining duties of the day McDonald drives the Ford Escort.

McDonald testified that he has not been trained in any specialized method of securing or defending the customer's property. Rather, he claims that he was trained by driving and performing the route with a more experienced employee. McDonald is not licensed to carry a weapon. However, he has received a handbook from Hudson detailing security measures to be taken by him, such as, telephoning the police in suspicious situations and avoiding circumstances which would put him in danger. Any suspicious activity is to be noted on the route sheet. If he is the subject of an attack or theft, he is supposed to turn over the materials he is carrying. He is not held accountable for any checks if they are stolen from him during the route. McDonald wears the same uniform as employees who work on armored vehicles and he has a badge. He is supervised by the same individual who supervises the employees working on armored vehicles. McDonald is the only full-time employee who performs the functions described above, although he testified that there are retirees who work part time performing the same work as he does. Although McDonald testified that some of these part-time employees received a pistol permit and transferred to positions working on an armored vehicle, he did not know the names of the individuals.[3]

Purdy testified that his organization represents about 200 to 300 guards employed by 2 private sector employers, Hudson and Mount Sinai Hospital.[4] With regard to the employees employed by Hudson, Purdy testified that in 1985, there was a "vote" pursuant to Case 2–RC–19890 but he did not recall if a Stipulated Election Agreement was reached or if a hearing was held to determine the 9(b)(3) status of the employees.[5] Purdy confirms that his organization represents McDonald and about 15 or 20 part-time couriers employed by Hudson, in addition to other guards employed thereby. However, Purdy claims that the part-time couriers operate armored trucks and vans.[6] He initially claimed that the part-time couriers are armed, although on cross-examination, he testified that they are not. Purdy testified that his organization has not entered into any contracts covering nonguard

[2] McDonald testified that if the armored minivan is not available he drives a regular station wagon in order to pick up the mail from Connecticut. However, the record does not reflect how often McDonald uses any vehicle other than the armored minivan.

[3] Initially McDonald claimed that the part-time employees only worked on an armored vehicle when help is needed on such a vehicle. He later explained that once a part-time employee receives a pistol permit, they transfer permanently to an armored vehicle position.

[4] The Petitioner also represents guards employed by some public sector employers.

[5] Administrative notice is taken of the fact that in Case 2–RC–19890, a Stipulated Election Agreement was approved on February 28, 1985. A certification of representative issued on March 15 1985.

[6] He testified that he never saw a Ford Escort at Hudson's facility.

employees. The Petitioner's constitution and bylaws contains a provision which states that the only individuals "eligible for membership include . . . armed or unarmed security guards, security couriers, or other individuals charged with the protection and/or transportation of property."[7]

Section 9(b)(3) of the Act defines a guard as "any individual employed . . . to enforce against employees and other persons rules to protect the property of the employer or to protect the safety of persons on the employer's premises." The Board initially limited this definition to the protection of money and valuables of the employer. *Brinks, Inc.*, 77 NLRB 1182 (1948). However, in *Armored Motor Service Co.*, 106 NLRB 1139 (1953), the Board overruled *Brinks* and extended the definition of guard to include armored drivers. See also *Teamsters Local 639 (Dunbar Armored Express)*, 211 NLRB 687 (1974). Later, in another *Brinks* case, *Brinks, Inc.*, 226 NLRB 1182 (1976), the Board extended the definition of guard even further to include unarmed courier drivers, stating that "the only issue presented is whether the couriers protect the property of the employer's customers." See also *MDS Courier Service*, 248 NLRB 1320 (1980). The Board continued to apply this standard in a line of *Purolator Courier* cases to determine whether unarmed courier drivers are statutory guards. See *Purolator Courier Corp.*, 268 NLRB 452 (1983); 266 NLRB 384 (1983); 265 NLRB 659 (1982); and 254 NLRB 599 (1981). In all of those cases, the Board found couriers to be guards within the meaning of Section 9(b)(3) of the Act inasmuch as their duties involve "directly and substantially, the protection of valuable property of the employer's customers." However, in *Purolator Courier Corp.*, 300 NLRB 812 (1990), the Board examined the standard articulated in the earlier cases and found that couriers were not statutory guards for a number of reasons, including that they received only minimal training and instruction regarding the protection and safety of customer property; they were not trained or authorized to use physical force or weapons; their job duties merely required the pickup, transport, and delivery of customer property with minimal access to the customer's premises; they were minimally accountable for the property involved; and they were held out to the public by the employer as delivery persons, and not guards. Based on these factors, the Board found that the couriers were not guards as their basic function did not involve, directly and substantially, the protection of valuable property of the employer's customers.[8] Similarly, in *Pony Express Courier Corp.*, 310 NLRB 102 (1993), the Board relied on the recent *Purolator* case in finding that the couriers were not guards inasmuch as their duties essentially were comprised of the pickup, transport, and delivery of customer property with no particular intrinsic value. Additionally, the Board noted that the couriers were directed, when faced with a perilous situation, to "remove" themselves and should they detect suspicious activity, they were instructed to call the police or a supervisor.

The Employer argues that Section 9(b)(3) prohibits the Board from certifying the Petitioner as a bargaining representative for guards inasmuch as it admits nonguards, such as the couriers employed by Hudson, to membership. An argument can be made that, under the Board's reasoning in the most recent *Purolator* and *Pony Epress* cases, McDonald may not be a guard within the meaning of Section 9(b)(3).[9] However, in 1985, when the Board certified the Petitioner as the collective-bargaining representative of Hudson's couriers and guards, couriers such as McDonald would have been considered a guard under the Boards reasoning in the 1981–1983 *Purolator* cases. Moreover, it is evident from the record that since 1985, Hudson voluntarily entered into collective-bargaining agreements with the Petitioner containing recognition clauses covering couriers such as McDonald. That an employer earlier chose to voluntarily recognize a mixed guard union does not mean that it is forever bound by that decision. In this regard, I note that the Second Circuit has held that mixed guard unions are appropriate only as long as an employer, in the absence of a collective-bargaining agreement, consents to recognize them. *Wells Fargo Armored Service*, 755 F.2d 5 (2d. Cir. 1985). Thus, when the Board's view on couriers shifted, Hudson had the privilege, upon contract expiration, to file a unit clarification petition seeking to exclude the couriers on the grounds that they do not fall within the ambit of Section 9(b)(3). Alternatively, upon contract expiration, it could have refused to bargain with the Petitioner relying on the court's theory in *Wells Fargo* that the policy concerns inherent in the statute allow it to rely on the strictures described by Section 9(b)(3), even if there exists a bargaining history where nonguards had been admitted to membership in the Petitioner's organization. Hudson did not chose either of the foregoing options. Rather, it continued to enter in collective-bargaining agreements covering the couriers and, until the extant contract expires, the Board will not entertain a petition for clarification to exclude the couriers. See *Wallace Murray Corp.*, 192 NLRB 1090 (1971).

The Employer seeks to attack the 9(b)(3) status of the Petitioner based upon a voluntary collective-bargaining agreement entered into by Hudson and the Petitioner covering couriers, the genesis of which was a Board certification. A similar issue was raised in *Burns Security Service*, 278 NLRB 565, 569 (1986), where the employer argued that the petitioner was not a certifiable guard union inasmuch as it represented nonguards employed by various other employers. There, the Board held that:

> [The status of employees as] guards may not have been litigated because of inadvertence or stipulation of the parties. Further, duties change over time and because of new technologies. Thus to apply Section 9(b)(3) in a strictly literal sense would require us to find that a national guard union . . . is not certifiable because it admits "close-call" nonguards to membership. This is

[7] G.C. Exh. 2.

[8] The Board did not reverse its finding in the prior *Purolator* cases. Rather, it stated that in the prior cases, the Board placed great weight on whether the couriers had access to customer premises rather than analyzing the entire range of actual employee duties. In the more recent *Purolator* case, the Board stated that access to the customer's premises is only one factor to be considered and "its significance is largely dependent on what functions the couriers perform upon gaining access."

[9] With regard to the part-time couriers, McDonald testified that these employees perform the same work as he does, while Purdy testified that they work on armored vehicles. Without the benefit of the testimony from a part-time courier, it is difficult to evaluate whether these individuals are guards.

> contrary to the clear intent of Congress. It would effectively prohibit large national unions for guards or would require guard unions to so strictly police their membership to exclude employees whose status presents close factual issues that numerous statutory guards would be precluded from exercising the right to representation under the Act.

Thus, for the foregoing reasons, the Board rejected the contention that the petitioner was not a certifiable union based on its representation of employees who may not be guards. In a more recent case, *Children's Hospital of Michigan*, 317 NLRB 580 (1995), the Board relied on its *Burns* analysis and declined to allow that employer to attack the certifiability of the petitioner on the grounds that certain employees were not 9(b)(3) guards, despite a stipulation by the parties to the contrary. There, the Board specifically stated that it would not allow the employer to collaterally attack the conclusive stipulation by the petitioner therein and another employer. In my view, that principle is applicable here. In 1985, the Board certified the Hudson unit including couriers because the Board previously held, for a number of years, that the inclusion of couriers as guards in an 9(b)(3) guard unit was appropriate. Hudson and the Petitioner voluntarily continued to include the couriers in the recognition clause of successive collective-bargaining agreements, even after the Board modified its view on the 9(b)(3) status of the couriers. It is contrary to the clear intent of Congress to allow the Employer to establish noncertifiability through collateral litigation of the guard status of some of Hudson's employees, when Hudson voluntarily agreed to include questionable or "close-call" nonguards in a guard unit. To permit an employer to attack the 9(b)(3) status of a labor organization in this manner would invite an in depth examination of every unit represented by a petitioning guard union in any representation proceeding and encourage burdensome litigation. Based on all of the foregoing, I find that the Petitioner herein is a certifiable guard union.